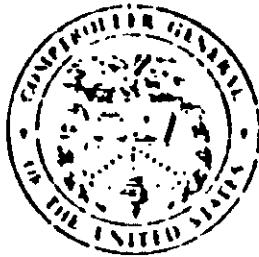


DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

PL-2
Melody
118703

FILE: B-203608

DATE: June 15, 1982

MATTER OF: Clear Thru Maintenance, Inc.

DIGEST:

1. Agency's requirement that both individual sureties on a bid bond have net worths in excess of their total outstanding surety obligations in order to be deemed acceptable sureties is unobjectionable since it is reasonably related to the purpose for which a bid guarantee is intended, namely, to protect the Government's financial interest in the event of default on the bid.
2. Questions concerning an individual surety's financial acceptability are matters of responsibility rather than responsiveness.
3. Although questions concerning an individual surety's acceptability are matters of responsibility, a bidder may not after bid opening substitute an acceptable individual surety for one deemed unacceptable because such a substitution would alter the sureties' joint and several liability under the bid bond, the principal factor in determining the bid's responsiveness to the bid guarantee requirement.
4. Bidder nonresponsibility determinations based on the unacceptability of an individual surety on a required bid bond need not be referred to the Small Business Administration (SBA) for review under the Certificate of Competency procedures; such determinations are based solely on the qualifications of the individual surety and there is no indication that Congress intended the Small Business Act to bring surety qualifications under the scrutiny of SBA.

Clear Thru Maintenance, Inc. protests the award of a contract to Suburban Industrial Maintenance under invitation for bids (IFB) No. GS-03-81-B-0054, issued by the General Services Administration (GSA) for custodial services at the Social Security Payment Center in Philadelphia, Pennsylvania. The protest stems from the rejection of Clear Thru's bid as nonresponsive based on the financial inadequacy of one of the individual sureties listed on Clear Thru's bid bond. GSA takes the position that, contrary to a number of our decisions, the question of surety acceptability relates to bid responsiveness rather than responsibility. The agency further maintains that notwithstanding whether the issue is one of responsiveness or responsibility, its method of determining the surety unacceptable was reasonable.

We agree with GSA that its evaluation of the surety's net worth was reasonable. We do not agree, however, that the issue of surety acceptability is a matter of bid responsiveness.

Clear Thru submitted the low bid while Suburban's bid was second low of the eleven bids opened on May 1, 1981. The solicitation required that a bid guarantee in the amount of 20 percent of the total one year bid price be submitted with each bid. Clear Thru complied with this requirement, submitting a bid bond listing two individual sureties. The penal amount of the bond was \$83,809.20. The affidavits of Individual Surety (Standard Form 28), completed by the sureties and furnished with the bond, indicated net worths of \$468,500 and \$483,000, respectively. Also, item 10 of the affidavits indicated that each had outstanding surety obligations of \$315,493.96.

During the preaward survey the agency reviewed Clear Thru's financial capability, which included examination of the information relating to the bid bond. The agency discovered that both sureties had neglected to list, under item 10 of the affidavits, certain surety obligations on other procurements. The penal amount on one of these undisclosed bonds was \$160,046.63 which,

when added to one of the individual's surety obligations of \$315,493.96 listed in his affidavit, increased his total outstanding obligations above his net worth by \$7,040.59. GSA considered this "deficit security situation" unsatisfactory.

Upon learning that the sufficiency of his net worth vis-a-vis his surety obligations was in question, the surety submitted a new bond and affidavit substituting a different surety for himself. The contracting officer refused to accept the substitution, however, based on his determination that this inadequacy of an individual surety rendered Clear Thru's bid bond unacceptable and its bid, thus, nonresponsive. He therefore rejected Clear Thru's bid by letter of May 28, and awarded the contract to Suburban. GSA reports it has subsequently learned that both the individual sureties were overextended, having pledged their net worths against at least \$2,000,000 in undisclosed surety obligations.

Clear Thru takes issue, principally, with the manner in which GSA determined the financial adequacy of its individual sureties. Specifically, it charges that it is unreasonable for GSA to accept only sureties with net worths in excess of their total outstanding surety obligations. The protester concedes that Federal Procurement Regulations (FPR) § 1-10.203(a) compels the contracting officer to consider the nature and amounts of a surety's outstanding surety obligations, but believes this consideration should entail a more thorough analysis than merely reducing net worth by the total amount of surety obligations. Clear Thru believes that the standard used by GSA is unnecessarily strict because it fails to take into account several factors which mitigate the Government's financial risk under a bid bond, such as the unlikelihood of default on a bid (based on past experience), and the contingent nature of surety obligations. It also argues that where the sureties are both obligated on another bond, the penal amount of that bond should at most be deducted from the net worth of only one of the sureties for the purpose of the contracting officer's analysis. Predicting that GSA's continued application of this acceptability standard will make it difficult for some bidders to secure adequate bonding, Clear Thru asks that we direct GSA to relax this standard and find that the sureties on its bid bond were acceptable.

The regulations require that a bid bond be executed by two individual sureties, each having a net worth not less than the penal amount of the bond, FPR § 1-10.203(a). That section entitled "Individual sureties" provides further that--

" * * * The number and amounts of other bonds upon which a proposed surety is bound, and the status of the contracts in connection with which such bonds were furnished, must be considered [by the contracting officer] in determining the acceptability of the individual surety.
* * *"

Because the contracting officer is not required to consider a surety's other bonds in any specific manner, he has discretion to determine how much weight to accord these bonds. In view of this discretion, we will not object to the contracting officer's treatment of a surety's other bonding obligations unless it appears to have been unreasonable. See Jets Services, Inc., et al., B-180554, June 6, 1974, 74-1 CPD 307, concerning the treatment of the same information under Defense Acquisition Regulation (DAR) § 10-201.2, which specifies that the contracting officer may decide whether the total, a portion or none of the surety's other bonding obligations should be deducted from its net worth.

GSA contends that the method it used to determine surety acceptability--subtracting the total penal amount of the surety's outstanding bond obligations from his net worth--was within the contracting officer's authority and reasonable in view of the agency's prior experience. While bidder defaults and bankruptcies (the two most likely situations where GSA will try to recover under a bid bond) may occur relatively infrequently, GSA explains, it has been necessary to go against sureties on service contract bid guarantees on several prior occasions. GSA notes further that many sureties, including the individual sureties in this case, underwrite large numbers of bonds for only a few principals, so the bankruptcy of one bidder could necessitate recovery

against the same surety under several bonds. GSA has adopted the surety acceptability standard in question to help assure that sureties in such a situation will have sufficient resources to fully satisfy their obligations to the Government. It is GSA's view, furthermore, that each surety must meet the standard if the two surety requirement in FPR § 1-10.203(a) is to be given effect.

We find no legal basis upon which to object to GSA's rejection of the individual here as an unacceptable surety. The purpose of the bid guarantee requirement is to protect the Government's financial interests in the event the bidder fails to execute the required contract documents and deliver the required performance and payment bonds. See 52 Comp. Gen. 223 (1972). GSA's requirement that both sureties have net worths at least equal to their total surety obligations clearly is calculated to achieve this purpose. While we agree with the protester that the strictness of GSA's standard may make it more difficult for some bidders to secure adequate bonding, this speculation alone does not support a conclusion that the standard is unreasonable. We note again that the corresponding DAR provision specifically permits the contracting officer to deduct the total of the surety's other bonding obligations from its net worth. See DAR § 10-201.2.

GSA has raised the question whether surety acceptability relates to bid responsiveness or bidder responsibility. GSA maintains it is a matter of responsiveness and that Clear Thru's bid was thus properly rejected once the contracting officer determined that one of the individuals was an unacceptable surety. GSA argues in the alternative that Clear Thru would have been rejected as nonresponsive in any event since the individual's surety obligations exceeded his net worth on the date of award. GSA submits further that, regardless of our determination as to this acceptability issue, both sureties' failure here to list numerous outstanding obligations as required under item 10 of the surety affidavit was an appropriate factor for consideration in the surety acceptability determination.

We disagree with GSA's view that the determination of an individual's acceptability as a surety on a bid bond is a matter of responsiveness. The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the invitation's material terms and conditions. 49 Comp. Gen. 553, 556 (1970). This determination of responsiveness must be made from the bid documents at the time of bid opening. Peter Gordon Company, Inc., B-196370, July 18, 1980, 80-2 CPD 45. We have held that a solicitation provision calling for a bid guarantee is a material requirement which cannot be waived. 38 Comp. Gen. 532 (1959). We have also recognized that a bid is nonresponsive where either the required bond is not submitted, de Weaver and Associates, B-200541, January 6, 1981, 81-1 CPD 6, or the submitted bond contains a deficiency which detracts from the joint and several liability of the sureties on the bond. See Structural Finishing, Inc., B-201614, April 21, 1981, 81-1 CPD 303, and Southland Construction Co., B-196297, March 14, 1980, 80-1 CPD 199 (bid nonresponsive where bond was altered without any evidence of approval by the surety); Cassidy Cleaning, Inc., B-191279, April 27, 1978, 78-1 CPD 331 (blank bid bond submitted).

The bid bond furnished by Clear Thru at bid opening was duly executed by two individual sureties whose affidavits indicated that they both had net worths at least equal to the penal amount of the bond, and was not otherwise defective on its face. The bond thus met the solicitation's bonding requirement and was legally sufficient to establish the joint and several liability of the sureties in the event of default on the bid by Clear Thru.

In our decision at 52 Comp. Gen. 184 (1972), recognizing that the failure of an individual surety to show on its surety affidavit at bid opening a net worth at least equal to the penal sum of the bid bond did not detract from the joint and several liability of the sureties, we stated--

* * * * the matter of the net worth of an individual surety on a bid bond is not one relating to the responsiveness of a bid but rather to the responsibility of the surety. The fact that an affidavit of an individual surety either has not been filed timely or has been filed timely but discloses assets insufficient to cover the penal amount of the bond does not affect the actual net worth of the surety. Since completion of the surety affidavit is solely for the benefit of the Government to disclose facts concerning the responsibility of the surety, we see no reason why contracting officials should not be able to ascertain, after bid opening but subject to the time restraints of the procurement, the acceptability of an individual surety based on required net worth. * * *"

52 Comp. Gen. 184, 187.

In the instant case, the individual surety showed a sufficient net worth on his affidavit at bid opening and was found unacceptable only because after bid opening the agency determined that he had other bonding obligations not listed in his affidavit to the extent that his total obligations exceeded his net worth. This clearly was a matter of responsibility. See also Jets, Inc., B-194017, April 16, 1979, 79-1 CPD 269; Cassidy Cleaning, Inc., supra; Jets Services, Inc., et al., supra.

Although acceptability of an individual surety, as a matter of responsibility, ordinarily may be established, time permitting, any time prior to award, Henry Spen & Company, Inc., B-183164, January 27, 1976, 76-1 CPD 46, replacement of an unacceptable surety after bid opening is not an allowable means for achieving this end. Such a substitution necessarily would alter the joint and several liability of the sureties under the bid bond, the principal factor in determining the responsiveness of the bid to the guarantee requirement. Elements of a bid which go to the bid's responsiveness cannot be changed after bid opening. S. Livingston & Son, Inc., 54 Comp. Gen. 593 (1975), 75-1 CPD 24. We therefore agree with GSA's refusal to permit the surety substitution proposed in this case.

GSA asks whether bidder nonresponsibility determinations based on the unacceptability of an individual surety must be referred to the Small Business Administration (SBA) under the Certificate of Competency (COC) procedure, 13 C.F.R. § 125.5 et seq.; FPR § 1-1.708.1. We do not believe such a referral is required. The Small Business Act was amended in 1977 (Pub. L. 95-89) to broaden the concept of "responsibility" for which SBA was to certify small businesses. Prior to 1977, SBA certification was limited to matters involving a bidder's capacity or credit. The Act, as amended, empowers SBA--

"* * * To certify to Government procurement officers, * * * with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern * * * to receive and perform a specific Government contract. A Government procurement officer may not, for any reason specified in the preceding sentence preclude any small business concern * * * from being awarded such contract without referring the matter for a final disposition to the Administration."


Although the language of this provision is quite broad, it does not appear to encompass the rejection of an otherwise responsible bidder based solely on the unacceptability of a proposed individual surety. Indeed, as the Court of Claims noted in a recent decision, the legislative history of the amendment indicates that this provision was enacted by Congress to abate continuing discrimination against small businesses "solely because of their smallness and disabilities allegedly resulting from that fact." Siller Brothers, Incorporated v. United States, 655 F.2d 1039, 1044 (Ct. Cl. 1981), petition for cert. filed (No. 81-1216). Congress' intent is clearly reflected in the concerns raised in the House Report on the 1977 amendment:

"* * * Small business can and has been denied Government contracts because the procuring activity has determined that the small business lacked the requisite 'tenacity, perseverance or integrity' to perform a specific Government contract. Such a finding results in the small firm being branded 'nonresponsible.' Resort to the COC procedure in such cases is not available since capacity and credit are, purportedly, not involved.
* * *"

H.R. Rep. No. 95-1, 95th Cong., 1st Sess. 13, reprinted in [1977] U.S. Code Cong. & Ad. News 821, 833.

While rejection of a bidder due to the inadequacy of a proposed individual surety is, technically, a matter of responsibility, the bidder itself is in no way "branded" since such determinations are based exclusively on the qualifications of the surety. We find no indication that Congress ever intended the Small Business Act to bring the qualifications of individual sureties under the scrutiny of SBA, and SBA's regulations do not specifically address the point. We accordingly conclude that such determinations need not be referred to SBA under the COC procedure.

The protest is denied.



Acting Comptroller General
of the United States